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# In the Supreme Court of the United States

OCTOBER TERM, 1955

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No. 843

BETHLEHEM STEEL COMPANY, PETITIONER

*v.*

FRANK A. CARDILLO, DEPUTY COMMISSIONER, UNITED STATES DEPARTMENT OF LABOR, BUREAU OF EMPLOYEES COMPENSATION, SECOND COMPENSATION DISTRICT

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The findings and order of the Deputy Commissioner (R. 6-8) are not reported. The orders of the District Court denying petitioner's motion for judgment on the pleadings (R. 15) and granting the Deputy Commissioner's cross-motion for summary judgment (R. 16) are likewise not reported. The opinion of the Court of Appeals (Pet. App. 15-16, R. 17-19) is reported at 229 F. 2d 735.

### JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1956 (R. 20). The petition for a writ of certiorari was filed on April 10, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether an award under the Longshoremen's and Harbor Workers' Compensation Act is valid where the employee, as a result of his employment, has suffered a "schedule loss" under the Act (permanent partial binaural loss of hearing) without losing wage-earning capacity.

### STATUTE INVOLVED

The pertinent parts of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901 *et seq.*, read as follows:

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * * * *

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment. * * *

* * * * *

COVERAGE

SEC. 3. (a) Compensation shall be payable under this Act in respect of disability or death of an employee * * *

* * * * *

COMPENSATION FOR DISABILITY

SEC. 8. Compensation for disability shall be paid to the employee as follows:

* * * * *

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section, respectively, and shall be paid to the employee, as follows:

* * * * *

(13) Loss of hearing: Compensation for loss of hearing of one ear, fifty-two weeks.

Compensation for loss of hearing of both ears, two hundred weeks.

* * * * *

(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

* * * * *

STATEMENT

Petitioner seeks review of a judgment of the Court of Appeals for the Second Circuit affirming the orders of the District Court which refused to enjoin an award made by respondent under the Longshoremen's and Harbor Workers' Compensation Act. The pertinent facts may be summarized as follows:

Philip McDermott had been employed by petitioner for fifteen years as a boilermaker, engaged in the repair of vessels (R. 6-7). McDermott's work was such that, while performing his regularly assigned duties, he was constantly exposed to loud noises. These noises cumulatively caused a permanent partial loss of hearing in both ears (R. 7). He first had difficulty with his hearing in April 1953 and, after an examination the following year by an ear specialist who declared that the loss of hearing had been caused by his employment, McDermott, on April 2, 1954, filed a claim for compensation for this loss of hearing. (R. 4, 7). Respondent, the Deputy Commissioner,

found that McDermott had suffered permanent partial disability by virtue of a 22.6% binaural loss of hearing,[1] and that he was therefore entitled to 45.2 weeks' compensation (22.6% of 200 weeks, the statutorily scheduled amount for full loss of hearing) at the maximum rate of $35.00 per week, or a total amount of $1,582 (R. 7). Respondent thereupon entered an award for that amount in McDermott's favor (R. 4, 8).

Petitioner filed suit in the District Court under Section 21 (b) of the Act, 33 U.S.C. 921(b), seeking to enjoin the award on the ground that it was not issued according to law, as the hearing loss suffered by McDermott did not, in fact, result in any incapacity to earn the wages which he was receiving at the time of his injury. (R. 3-5). Respondent denied only that the award was unlawful (R. 10) and, when petitioner moved for judgment on the pleadings, cross-moved for summary judgment (R. 12, 13). The District Court denied petitioner's motion. It then granted respondent's cross-motion (R. 15, 16).

On appeal, the Court of Appeals affirmed, holding that:

> * * * The judgment is clearly governed by our recent decision in *Travelers Insurance Company* v. *Cardillo*, 225 F. (2d) 137 (C.A. 2) [certiorari denied, 350 U.S. 913]. The loss of hearing is covered by Section 908 (13) and is

[1] The degree of hearing loss was stipulated by the parties to have been 22.6%.

thus one of the "schedule losses" set forth in Section 908, and in *Travelers* we held that, as to any schedule loss, there is a conclusive presumption of loss or reduction of wage-earning capacity [R. 18].

ARGUMENT

1. In seeking review of a compensation award that has been twice affirmed by the lower courts, petitioner bases its argument upon the misconception that respondent contends and that the Court of Appeals held, notwithstanding the provisions of Sections 3 and 8 of the Act, *supra*, pp. 3-4, that compensation was lawfully awarded to McDermott although he was not "disabled" (Pet. 5, 6). To the contrary, respondent's position, as adopted by the Court of Appeals, has consistently been that the loss of a body member, or the loss of its use, is *per se* a "disability" within the meaning of Sections 3 and 8, irrespective of any resultant wage loss, *i.e.*, that McDermott, who suffered a schedule loss in permanently and partially losing his hearing in both ears, is conclusively presumed to have also suffered a reduction in earning capacity to the extent listed in the schedule, thereby satisfying the statutory requirement that he be "disabled".

This presumption is by no means arbitrary or irrational as urged by petitioner. Although McDermott may not at this moment have suffered any loss in earning capacity, his diminished hearing could easily affect future earnings. Indeed,

the underlying purpose of a workmen's compensation loss schedule such as that contained in Section 8(c) of the Act *supra*, pp. 3-4, is to relieve the administering agency from the almost impossible task of determining in each case the potential as well as actual wage loss resulting from the severe and immeasurable injury caused by loss of a body member or its use. By establishing the conclusive presumption that wage loss occurred in the amounts listed in the schedule the Act obviates this difficulty.

There are few principles in the law of workmen's compensation that are better established than the proposition that "if the loss of a member, or impairment of a faculty, * * * is one which is provided for in the schedule * * * this in itself establishes a compensable disability, irrespective of any wage loss." *Green Bay D.F. Co.* v. *Industrial Commission*, 265 Wis. 38, 60 N.W. 2d 409, 412 (1953).[2] The courts of at least a dozen states, including those of New York, whose workmen's compensation laws served as a pattern for the Longshoremen's and Harbor Workers' Compensation Act, have likewise held that the existence of wage loss is irrelevant when there has been a schedule loss. See, for example, *Agricola Fur-*

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[2] That case involved a schedule loss caused by occupational disease rather than physical injury but there is no reason for not applying this principle to all schedule losses, especially since the statute itself makes no distinction but defines "injury" as including occupational disease as well as traumatic injury. Section 2(2), *supra*, p. 2. Moreover, all of the other cases cited involved traumatic injury.

*nace Co.* v. *Smith,* 239 Ala. 488, 195 So. 743 (1940); *Williams* v. *Industrial Commission,* 73 Ariz. 57, 237 P. 2d 471 (1951); *Dombrozzi* v. *E. Gross & Co.,* 112 Conn. 627, 153 Atl. 780 (1931); *H. K. Toy & Novelty Co.* v. *Richards,* 68 Ind. App. 653, 117 N.E. 260 (1917); *Stammers* v. *Banner Coal Co.,* 214 Mich. 215, 183 N.W. 21 (1921); *Otoe Food Products Co.* v. *Cruickshank,* 141 Neb. 298, 3 N.W. 2d 452 (1942); *DeZeng Standard Co.* v. *Pressey,* 86 N.J.L. 469, 92 Atl. 278, affirmed, 88 N.J.L. 382, 96 Atl. 1102 (1915); *Rosati* v. *Despatch Shops Inc.,* 298 N.Y. 813, 83 N.E. 2d 860 (1949); *Rowe* v. *McGovern,* 254 App. Div. 432, 5 N.Y.S. 2d 626 (1938); *State ex rel. Dudley* v. *Industrial Commission,* 135 Ohio St. 121, 19 N.E. 2d 895 (1939); *Winona Oil Co.* v. *Smithson,* 87 Okla. 226, 209 Pac. 398 (1922); *New Jellico Coal Co.* v. *Gilburth,* 187 Tenn. 606, 216 S.W. 2d 329 (1948); *Nicely* v. *Virginia E. & P. Co.,* 195 Va. 819, 80 S.E. 2d 529 (1954).

The rationale of this principle is succinctly stated as a universal rule of workmen's compensation laws in 2 Larson, *Workmen's Compensation Law,* Sec. 58.10 (1952):

> Schedule-type payments for permanent partial disability appear on the surface to be so different from regular wage-loss benefits that they might seem to be based on an entirely different principle. The typical schedule provides that, after the injury has become stabilized and its permanent effects can be ap-

praised, benefits described in terms of regular weekly benefits for specified numbers of weeks shall be paid * * *. *These payments are not dependent on actual wage-loss. Evidence that claimant has been regularly employed at greater earnings than before is completely immaterial.* [Citing cases.]

This is not, however, to be interpreted as an erratic deviation from the underlying principle of compensation law—that benefits relate to loss of earning capacity and not to physical injury as such. The basic theory remains the same; the only difference is that *the effect on earning capacity is a conclusively presumed one, based on observed probabilities in many similar cases, instead of a specifically proved one, based on the individual's actual wage-loss experience.* The effect must necessarily be a presumed one, since it would be obviously unfair to appraise the impact of a permanent injury on earning capacity by looking at claimant's earning record for some relatively short temporary period preceding the hearing. The alternative is to hold every compensation case involving any degree of permanent impairment open for a lifetime, making specific calculations of the effect of the impairment on claimant's earnings each time claimant contends that his earnings are being adversely affected. To avoid this impossible administrative task, the apparently

> cold-blooded system of putting average-price tags on arms, legs, eyes and fingers has been devised. [Emphasis supplied.]

2. Petitioner asserts (Pet. 8-9) that the decision below confuses the statutory terms "injury" and "disability" and hence is in conflict with language in *Pillsbury* v. *United Engineering Co.*, 342 U.S. 197. However, the *Pillsbury* case, where this Court carefully distinguished "injury" and "disability", did not concern a schedule loss but a limitations problem. In this case, unlike *Pillsbury*, when McDermott lost his hearing in both ears he not only suffered an "injury" within the meaning of Section 2(2) of the Act, *supra*, p. 2, but, because loss of hearing is a scheduled loss under Section 8(c), *supra*, pp. 3-4, he also suffered a "disability" within the meaning of Section 2(10) of the Act, *supra*, p. 3. There has thus been no confusion between the terms "injury" and "disability"; the courts below merely found that, in view of the facts and of the statutory scheme, McDermott suffered both an "injury" and a "disability".

The decision of the court below is clearly correct and is not in conflict with any decision of this Court or with any decision of a lower federal court. It is consistent with, and follows, the previous decision of the court below in *Travelers Insurance Co.* v. *Cardillo*, 225 F. 2d 137, certiorari denied *sub nom. Bushey & Sons* v. *Cardillo*, 350 U.S. 913.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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